***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-1154

*To be argued by*
ROBERT J. JOSSEN

B
P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1154**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

CLARENCE R. SEARS, JR.,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA



ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

ROBERT J. JOSSEN,
LAWRENCE B. PEDOWITZ,
*Assistant United States Attorneys, Of Counsel.*

## TABLE OF CONTENTS

## TABLE OF CASES



## OTHER AUTHORITIES

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1154**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CLARENCE R. SEARS, JR.,

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Clarence R. Sears, Jr. appeals from a judgment of conviction entered on April 5, 1976, after a trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 75 Cr. 1270, filed on December 31, 1975, charged Sears with two counts of participating in the use of extortionate means to collect and attempt to collect an extension of credit, in violation of Title 18, United States Code, Section 894(a).

Trial commenced on February 25, 1976 and continued until February 27, 1976, when the jury found Sears guilty as charged.* On April 5, 1976, Judge Cannella suspended

* On February 27, 1976, Judge Cannella granted Sears' motion to consolidate the two counts in the indictment. Accordingly, the jury returned only a single verdict of guilty.

the imposition of sentence and placed the defendant on probation for a period of three years.

## Statement of Facts

### The Government's Case

#### A. The Loan

In late July 1975, James Johnson, a letter carrier with the Postal Service, approached the defendant Sears and asked him if he could borrow $2,000 for the downpayment on a house Johnson was about to purchase. Sears, also a postal employee, from whom Johnson had previously borrowed money and repaid it with interest (Tr. 48, 255-56),* told Johnson he would see what he could do for him and if he could "borrow it from somebody." (Tr. 33).

Thereafter, in early August 1975, Sears loaned Johnson $2,000 in cash and told him that there would be just a few dollars in interest. Sears and Johnson agreed that the latter could repay the loan within three months. (Tr. 34).

#### B. Demands for repayment

In October 1975, Sears told Johnson that he wanted $1,000 of the loan to be repaid. Johnson, after making some efforts to borrow the money from loan companies, managed to borrow the $1,000 from a co-worker at a part-time job. (Tr. 36). This $1,000 was repaid to Sears during the last week in October, at which time Sears pretended that Johnson had short-changed him by $200. Per-

---

* References to the transcript are abbreviated "Tr."; references to Government exhibits are abbreviated "GX".

turbed by Sears' actions, Johnson demanded and received a receipt for the $1,000. (GX 2; Tr. 34-38). During the same incident Sears for the first time advised Johnson of what he had in mind by a "few dollars" in interest. Sears told Johnson that he wanted $600 to be paid in interest on the loan. (Tr. 39).

## C. The Threats

The matter of the repayment of the remaining $1,000 plus interest (which was eventually raised from $600 to $750) remained dormant until November 5, 1975. In the early morning of that day, at the Boulevard Station Post Office in the Bronx, where both Sears and Johnson worked, Sears approached Johnson and demanded repayment. Sears threatened Johnson that "if you don't have my money by Friday, I am coming to your house with my piece and I am going to blow you away." (Tr. 42).* Sears' explicit threat to do away with Johnson with his gun—a gun which Johnson testified he had seen in Sears' home in April, 1975 (Tr. 42)—was overheard by a co-worker, Alberta Young, who testified at trial. (Tr. 95).

Reacting to Sears' threat to cause him harm, Johnson reported the matter to postal inspectors on November 7, 1975. (Tr. 43). On that day, in the presence of the inspectors, Johnson placed a phone call to Sears at a number which had been left for him at the post office by Sears. (Tr. 43-44).**

---

* This threat was originally Count One of the indictment.

** Prior to this phone call, Sears had been looking for Johnson that day. Sears called the Boulevard station twice on the morning of November 7, 1975, and finally left with the timekeeper, John Burrell, a phone number where Johnson could reach Sears. According to Burrell, Sears sounded "a little annoyed" during the second phone call. (Tr. 106-108).

During this phone conversation, which was recorded with Johnson's consent (Tr. 45), Sears confirmed the threat he had made just two days before.*

Sears also told Johnson that he had borrowed the money from a man named Dominick and that Johnson's failure to repay the full loan had put Sears in trouble with Dominick.** Sears advised Johnson that he had al-

---

* "Johnson: You see I . . . I . . . why I called you back, I tell you why I called you back because I mean like what you told me Wednesday. You know what you told me Wednesday?

Sears: Yeah, I know what I told you Wednesday.

* * *

Sears: No, but Johnson I just can't live like this man.

Johnson: I understand what you mean but I mean it was shocking to me man I tell you the truth I got speechless.

Sears: Well, really I meant it.

Johnson: I know you meant it, I know you meant it—

Sears: I wasn't bullshiting at all." (GX 1, 1-A, at 2, 5-6.)

The entire transcript of the November 7, 1975 telephone conversation between Sears and Johnson is reproduced in the Appendix to the Government's brief.

**"Johnson: You know what I mean and I haven't I haven't slept since then man I tell you the truth.

Sears. Well listen . . .

Johnson: I mean I never, I never went through with that before. I never was threatened, nobody never threaten my life.

Sears: Well I took the weight off of you.

Johnson: huh . . .

Sears: You cost me a lot of money. I say I took the weight off of you, it cost me a lot of money and a by the same token Dominick doesn't even want me to represent anybody that . . . that's going to even think to do something like that.

Johnson: I see what you mean.

[Footnote continued on following page]

ready "paid the dude . . . I paid Dominick" (GX 1-A, at 7), and that Sears had to have his money back from Johnson because he had "to have money to work with." Sears continued:

"Sears: How could I give you money if I have to take your business too

Johnson: Right

Sears: You understand, to deal.

Johnson: Right, I understand

Sears: I have to have it to work with—

Johnson: I understand

Sears: And then you come up short, you understand me.

Johnson: Like I say . . .

Sears: I have commitments too." (GX 1-A, at 5-6).

Immediately thereafter in the same conversation Sears threatened Johnson again. This time the defendant told Johnson:

"Sears: But you know like I could pay $50.00 and that's it.

Johnson: huh

Sears: I could pay $50.00 and the honeymoon is over, really

Johnson: What do you mean, $50.00 for what?

Sears: Just in general to do anything to have you wasted or what.

---

Sears: You understand what I mean?
Johnson: Yeah, I understand what you mean.
Sears: You know, cause this will really interfere with his ship.
Johnson: I understand." (GX 1-A, at 2).

Johnson: You mean you could pay $50.00 to have me blown aw ?

Sears: I could do it in a minute. All I do is pick up a phone." (GX 1-A, at 5).

In unmistakable terms—as confirmed by Sears on cross-examination (Tr. 270-71)—Sears' statements were explicit threats to have Johnson killed.

### D. Sears' Arrest

On the following Monday, November 10, 1975, Sears was arrested by postal inspectors Donald Howd and Phillip Renzulli. After being advised of his constitutional rights Sears was asked whether he had threatened Johnson in connection with the loan between them. Sears responded that he "possibly" remembered threatening Johnson and that he had done it more "to have a psychological effect" in obtaining repayment. (Tr. 111-12).

## The Defense Case

### A. Sears' Direct Examination

The defendant testified that he had been employed by the Post Office since 1966. He had known Johnson as a co-worker for five years and Alberta Young for about two to three years. (Tr. 210).

Sears had loaned money to Johnson prior to the $2,000 loan. On one occasion he gave Johnson $100 and on another $200. Sears claimed that on the first loan Johnson had suggested paying back "some change" for the loan but that the $200 was repaid without interest. (Tr. 211-13).

It was Sears' version of the $2,000 loan that the money had been turned over to Johnson in June 1975 and that Johnson had offered to repay $400 in interest for a two month loan. (Tr. 213). The defendant produced his bank book (DX D)* as support for the date of the payment of $2,000 to Johnson.**

Sears further claimed that during the October 1975 repayment of $1,000 it was Johnson who offered to pay an additional $200 in interest because he knew he was "jamming" Sears up (Tr. 216-17), and that Johnson had tried to short-change him by $200. (Tr. 221).

Other than the November 7, 1975 recorded phone conversation, Sears denied *ever* speaking to Johnson about the money after October, 1975. (Tr. 217-18). Sears specifically denied having had any conversation with Johnson on November 5, 1975, the day that—according to Johnson and Young—Johnson had been threatened by Sears. (Tr. 223).

Sears was given a copy of the transcript of the November 7, 1975 phone conversation (GX 1-A) and testified that he had used certain words as "slang expressions" (Tr. 226-27); that "Dominick" was a "deli proprietor" whose name he had used "as a psychological thing to get my money back from Johnson" (Tr. 228); that he had not obtained the $2,000 from Dominick (Tr. 229); and that Sears had used the name Dominick be-

---

* References to defendant's exhibits are cited as "DX."

** Sears also called as a witness Karen McNulty who testified that she was with Sears on a Saturday in July 1975 when he handed $2,000 to Johnson. (Tr. 125). On cross-examination McNulty, who was a very close friend of the Sears' family, admitted that she had never met Johnson before; that she knew the name Johnson only because that was the name used by Sears; and that she had not given any date of the meeting in a prior written statement dated November 30, 1975. (Tr. 126-29; GX 3).

cause he knew "Dominick had sort of a rough reputation, so I tried to psych Johnson." (Tr. 235). Sears also denied that he had ever been in the business of lending money to others. (Tr. 245).

### B. Sears' Cross-Examination

On cross-examination, Sears testified that on each of the prior occasions when he loaned money to Johnson he had received more than the initial loan in repayment. (Tr. 256). Sears further testified that he had loaned money to people other than Johnson. (Tr. 257-59).

In flat contradiction to his direct testimony and the early part of cross-examination (Tr. 268), Sears finally admitted that he had in fact threatened Johnson on November 5, 1975 by telling him that he would come to Johnson's house "with his piece" and "blow him away" if the money was not repaid by Friday. (Tr. 273, 274-75).

### C. Defendant's Other Witnesses

In addition to his own testimony, Sears called a number of co-workers who testified as character witnesses * and some of whom testified that they did not hear any threat by Sears to Johnson on November 5, 1975—although they had no specific recollection of that particular day. Sears' two sons testified that they had never seen a gun in their father's apartment.

---

* Sears also called as a witness Napoleon Holmes, the director of the New Rochelle Community Action Agency, who testified as to defendant's character in the New Rochelle community.

## ARGUMENT

### The trial court's charge was not erroneous.

### A. The trial court charged in the manner to which the defendant claims he was entitled

Sears claims that he was entitled to a charge that his actions and/or words had to reasonably induce fear in an ordinary person before he could be convicted. Assuming *arguendo* that Sears' argument correctly states the legal standard enunciated in *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, — U.S. — (1976), the trial court's instructions fully complied with this standard.

In his main charge to the jury Judge Cannella explained the concept of the use of extortionate means as follows:

> "Moreover, in deciding whether the defendant wilfully used threats of physical harm or other criminal means, you must decide whether the defendant's words and/or actions were reasonably calculated by him in the light of the surrounding circumstances to instill fear in the person to whom they were directed or in any other ordinary person.
>
> In other words, what we're saying is, if what Sears said would in Johnson's or in an ordinary person make them feel that they were being threatened, that they should be fearful of their life, that is the concept we're talking about at this time. You should take into consideration on this question all of the evidence in this case bearing on what the defendant intended by his statements and/or actions. You may consider what if anything the defendant knew about the person to whom the statements were made, the nature of

the transaction, the amount involved, and any other surrounding circumstances you may find in the case.

Again, the crucial question on this first element for you to decide is: Did the defendant reasonably calculate by his words to instill fear or to give the impression that physical harm or other criminal means would be used to the person to whom these statements were directed, or to an ordinary person. The defendant need not, however, have intended to carry out the threat to be guilty of the crimes charged. That is immaterial in the case. Even though Sears says, 'Well, I really didn't intend to do that,' that is not the measure of this particular element. What is involved here is how did that affect Johnson or an ordinary person who would hear this? What's the effect on the one that hears it? Is he in fear? That is the standard that you must use in determining this. So that in summary, you must find that the government has proved to your satisfaction beyond a reasonable doubt, each of the elements of the crime which I have just described to you before you may find the defendant guilty under the count in this case." (Tr. 346-48).

Following the Court's main charge and the commencement of deliberations, the jury sent a note which requested, *inter alia*, a repetition of the four essential elements of the offense. The Court repeated the essential elements several times to clarify them for the jury. (Tr. 361-63).*

---

* The jury showed particular confusion about the element requiring that the defendant be found to have acted "unlawfully, wilfully and knowingly."

Thereafter, the jury delivered another note which made the following inquiry:

> "[M]ust the victim feel frightened as a result of what is said or does the fact that a threat was made stand by itself?" (Ct. Exh. 4; Tr. 365-66).

Judge Cannella answered this note as follows:

> "In the first place, you recall the statute says that extortionate means is defined as follows: Any means which involves the use or an express or implicit threat or use of violence or other criminal means to cause harm to the person, reputation or property of any individual. So that is what we mean by an extortionate means. Extortion as far as this statute is concerned includes any act or statement which constitutes a threat if it instills fear in the person to whom they [sic] are directed or are reasonably calculated to do so in the light of the surrounding circumstances. In answer to your specific question, must the victim feel frightened as a result of what is said? No, doesn't make any difference whether he gets frightened or not. In reference to the second part of it, does the fact that the threat was made stand by itself? Yes. In other words, you are to consider what the defendant said and what he intended the effect that would have on the other person. What he, the sayer, the deliverant, what he intended that statement, what effect that would have on Johnson. So the fact that Johnson was or was not afraid actually as a fact is not relevant in this case. What is relevant is when Sears said that, what did he intend to convey to Johnson? Did he intend to put him in fear? Did he intend to use his language, to use psychological force to force him to pay this? If that is what he intended, then he violated the law." (Tr. 366-67) (emphasis supplied).

Sears does not attack—and indeed concedes—the correctness of the trial court's response to the first question, that the victim need not feel frightened by the threats. *United States* v. *Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). He asserts, however, that the Court's one-word "yes" answer—taken out of context from the complete response—to the question whether the threat stands by itself somehow discouraged the jury from determining whether Sears' intentional actions would have reasonably induced fear in an ordinary person. Defendant's quotation of the Court's response (Brief at 15) artfully ignores the fact that the Court in the same context specifically charged that

> "[e]xtortion as far as the statute is concerned includes any act or statement which constitutes a threat if it instills fear in the person to whom they are directed *or are reasonably calculated to do so in the light of surrounding circumstances*" (Tr. 366) (emphasis added).*

Reading the Court's response in its entirety, it is plain that Judge Cannella did not contradict or alter his earlier instructions, which Sears concedes were correct even under his reading of *Natale*. The Court explicitly recharged, in the same terms as before, the definition of extortionate means—including the requirement that the threats instill fear in the person to whom directed or reasonably be calculated to do so in light of surrounding circumstances.

Viewed in its proper context, the jury's inquiry was principally aimed at learning whether the victim himself need be in fear, an unnecessary requirement under

---

* Sears' brief omits this quoted language entirely in assessing the adequacy of the Court's supplementary charge. (See Brief at 15).

*Natale*. The Court's additional charge, while perhaps gratuitous, simply was designed to assure that the jury would also focus on *whether Sears intended to threaten his victim*, an added protection for the defendant.* The supplemental charge clarified the issue of intent for the jury and assured that Sears could not be convicted unless the jury was satisfied that his statements had been made intentionally as threats.

## B. The District Court's charge conformed with the standard of *Natale*

Sears' attack on the trial court's supplemental instructions is premised upon the view that this Court's decision in *United States* v. *Natale*, *supra*, requires an objective finding that the victim himself, or an ordinary person, would have been placed in fear by the defendant's actions or threats. While we submit that Judge Cannella's charge passed muster even under this standard (Point A., *supra*), Sears' reading of the "reasonably calculated" test enunciated in *Natale* is not correct and, indeed, by focusing on the victim's state of mind, as opposed to the defendant's, seeks to stand *Natale* on its head. Thus, even if the trial court's instructions are found to have focused the jury on the defendant's intent alone, they are, we submit, still correct under *Natale*.

In *Natale* this Court made plain that § 894 was designed to focus upon "the conduct of the defendant, not the victim's individual state of mind . . ." Thus, the Court emphasized that it is the " 'calculated' use of threatening gestures or words to collect credit ex-

* It was not surprising that Judge Cannella focused the jury's attention on this element, since the jury's earlier note had demonstrated some confusion on the issue of intent.

tensions which Congress has made criminal." 526 F.2d at 1168. See also, *United States* v. *Curcio*, 310 F. Supp. 351, 357 (D. Conn. 1970).

Sears' interpretation of § 894 shifts the emphasis of the statute to the effect on the victim, rather than the defendant's intended effect. Such a construction is plainly inconsistent with *Natale;* for so long as the actions or statements were reasonably calculated *by the defendant* to place the victim in fear, the statute is violated.*

In both the main charge (Tr. 346-47), as well as his supplemental instructions, Judge Cannella properly and clearly framed for the jury the critical question of Sears' intent. Thus, at the conclusion of the Court's response to the jury note, Judge Cannella explained:

> "What is relevant is when Sears said that, what did he *intend to convey* to Johnson? Did he *intend* to put him in fear? Did he *intend* to *use his language,* to use psychological force *to force him to pay this?* (Tr. 366-67) (emphasis supplied).

Implicit in the trial court's supplemental instructions was that the jury should consider all surrounding circumstances to determine what Sears intended by his threats, a matter which the court had elaborated upon

---

* A simple example, not unlike this case, makes clear the error in the defendant's understanding of *Natale.* Under the defendant's standard if a loan-sharking victim reported to the police his belief that he was going to be threatened and then went to meet with his lender, accompanied by full police protection and tight surveillance, and a threat was made, there could be no conviction of the defendant—regardless of the strength of the threats—if his victim unquestionably felt secure, as would any ordinary person under similar police protection. Manifestly, the threats made in such circumstances fall within the clear ambit of illegal activity prohibited by the statute.

[Footnote continued on following page]

explicitly in its main charge. (Tr. 342, 346-47). And assessing the court's meaning from the whole charge—as is required, *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976); *United States* v. *Wells*, 506 F.2d 924 (5th Cir. 1975); *United States* v. *Gottlieb*, 493 F.2d 987, 994-95 (2d Cir. 1974); *United States* v. *Schiller*, 187 F.2d 572, 574 (2d Cir. 1951)—it is plain that Judge Cannella's instructions were neither erroneous nor misleading.

### C. Even if the Court committed error, the error was harmless.

Even if Sears is correct that the trial court omitted in its supplemental instructions an element which is required to be found under *Natale*—a contention which we vigorously dispute—, the error was harmless.

Under defendant's formulation of the *Natale* standard, Judge Cannella did not incorrectly charge the jury in his supplemental instructions; at most, the court omitted in its response to the jury's note an additional element under § 894 which it was not required to include in a properly framed reply. In such circumstances, in order to put the trial court in error, the defendant was required to make a specific exception to the charge

---

Defendant's "95-pound weakling—Muhammad Ali" example, offered as a contrary hypothetical (Brief at 13), is both far-fetched and unpersuasive. Examined in the extreme as posited by defendant such a case would present a serious question as to the competence of the defendant. However, viewed in a different light, a "95-pound weakling" would be very capable of violating the statute, either by veiled threats of harm to be brought upon "Ali" by others, or by the known presence of a gun on the defendant's person. The severity of the threats and the context in which the are made are factors to be evaluated in the first instance by the prosecutor, who must decide, within his discretion, whether a particular prosecution should proceed.

and to suggest appropriate curative instructions. See *United States* v. *Eagan*, 516 F.2d 1392 (8th Cir.), *cert. denied*, 423 U.S. 856 (1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Pellegrino*, 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

An examination of defense counsel's exception to the supplemental charge clearly indicates that the error so loudly trumpeted in this Court was not specifically brought to the attention of the trial court:

> "MR. CURLEY [defense counsel]: May I note an exception to your Honor's recharging the jury on that point, especially the latter part in which the terms of the context of which Mr. Sears made the remarks.
>
> THE COURT: I tracked Natale on it. If you can show me where I didn't track Natale, tell me. What do you think I should have said?
>
> MR. CURLEY: At the time Mr. Sears made the remarks to Mr. Johnson, those remarks can be considered in their context in consideration of all the facts and circumstances.
>
> THE COURT: I did say that to them.
>
> MR. CURLEY: I think your Honor said that in the beginning, but then as you continued you went into certain definitions concerning what he said at the time and just said, did he say what he says he said or what the government contends and did he mean it at that time and you should have left it at that point.
>
> THE COURT: I disagree. You have an exception to the Court's charge. All right, gentlemen." (Tr. 367-68).

At no point in his objection to the supplemental charge did defense counsel specifically except to a failure to charge again that the victim, or an ordinary person, had to be put in fear before the defendant could be convicted. Nor, for that matter, did defendant even except to the Court's affirmative response to the question whether the threat stands by itself. Defense counsel's unclear and ambiguous objection to the charge was, at best, a general exception insufficient on its face to place the trial court in error on the specific point raised on appeal. Rule 30 of the Federal Rules of Criminal Procedure specifically provides that no party may assign as error any portion of the Court's charge or any omission unless he distinctly states the matter to which he objects and the grounds for his objection. Indeed, despite an express invitation by the Court to offer appropriate instructions, the defendant did not offer any language which would have cured the error now claimed on appeal.*

Moreover, in the circumstances of this case, the error, if one was committed, was harmless. The proof of Sears' guilt and of his specific intent to put Johnson in fear was overwhelming: the threats were clearly spelled out on the tape; Johnson testified he was frightened because he knew Sears had a gun; the defendant had admitted to postal inspectors that he had made the threats for the "psychological effect" to force the victim to pay; and, on cross-examination, Sears admitted that he had threatened Johnson on two occasions—an admission which clearly demonstrated that his testimony during direct examination had been untruthful.

Nor could there have been any doubt that an ordinary person would have been put in fear by the threats, if

---

* It is plain that since the supplemental charge was not incorrect but, at most, incomplete, no plain error was committed by the Court.

such a finding was required under *Natale*. Contrary to defendant's characterization of this case as a simple loan from one friend to another,* the context of the threats clearly justified a jury's finding of fear. Demand for the repayment of the loan—clearly usurious at an annual rate of interest in excess of 100%—was accompanied by direct and repeated threats of violence. Sears' references to a third party (with a "rough reputation") who allegedly was in the business of making such loans with the defendant, together with the threat that he could have the victim "blown away" in a minute just by "picking up a phone", clearly would have instilled fear in an ordinary person. Indeed, the victim's conduct manifested fear. He had previously repaid $1,000 on the loan and did not report the matter to postal authorities until he had been threatened by Sears.

In short, the jury's verdict of guilt was inescapable on this record and should not be disturbed on appeal.

---

* Defendant's assertion that this case is the "realization of the prophesy * * * that the federal government would become involved in a prosecution occasioned by a loan from one friend to another," (Brief at 16) is simply misguided. Defendant's off-hand reference to the line of argument foreclosed by *United States* v. *Perez*, 426 F.2d 1073, 1080 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971) ignores the facts which justified federal prosecution. Defendant clearly sought to collect a usurious loan which he had told the victim had been made through a man with a "rough reputation." On the basis of this reference, and defendant's prior loan transactions of which the Government had knowledge, the Government had reason to believe that the defendant was a cog in a loan-sharking operation. Whether the Government's belief was ultimately substantiated or not, did not—and could not—affect the Government's duty and responsibility to prosecute this violation of the statute.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

ROBERT J. JOSSEN,
LAWRENCE B. PEDOWITZ,
*Assistant United States Attorneys, Of Counsel.*

# APPENDIX

## Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A

| | |
|---|---|
| Female Voice: | Hello |
| Johnson: | Hello, hey listen this is is Johnson, is Sears there? |
| Female: | Yes, hold on a minute. |
| Johnson: | Thank you. |
| Sears: | Hello |
| Johnson: | Hey Sears |
| Sears: | Yeah |
| Johnson: | Hey listen, you know I hate to, I hate to disturb you. This is Johnson |
| Sears: | Yeah I know |
| Johnson: | Hey listen I was thinking about thata that 1750, right? |
| Sears: | Right |
| Johnson: | Hey look, I tell you right off the bat man it going to be a problem for me. Just tell me one thing can you work something out, something a little bit easier for me? |
| Sears: | How easy can I work it? |
| Johnson: | Say every . . . say every pay period I give you something. |
| Sears: | Oh man I . . . I . . . like I told you man this time It's different in the family man I really needed the money to try to help my wife. |
| Johnson: | Yeah I know what you mean see |
| Sears: | Understand what I mean |
| Johnson: | Yeah I understand what you mean |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

Sears: Man I was depending on you today. This is why I was calling . . .

Johnson: You see I was thinking it over now you know I am so upset like from . . . you really upsetted me uh . . . what was it . . .

Sears: Well . . .

Johnson: What morning was that, Wednesday morning

Sears: I don't know but it's just the point of it man you really got me in a bind to . . . cause you know like I had . . . money.

Johnson: You see I . . . I . . . why I called you back, I tell you why I called you back because I mean like what you told me Wednesday. You know what you told me Wednesday?

Sears: Yeah, I know what I told you Wednesday.

Johnson: You know what I mean and I haven't I haven't slept since then man I tell you the truth.

Sears: Well listen . . .

Johnson: I mean I never, I never went through with that before. I never was threatened, nobody never threaten my life.

Sears: Well I took the weight off of you.

Johnson: huh . . .

Sears: You cost me a lot of money. I say I took the weight off of you, it cost me a lot of money and a by the same token Dominick doesn't even want me to represent anybody that . . . that's going to even think to do something like that.

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

Johnson: I see what you mean.

Sears: You understand what I mean?

Johnson: Yeah, I understand what you mean.

Sears: You know, cause this will really interfere with his ship.

Johnson: I understand.

Sears: You know

Johnson: Right

Sears: And uh you know, I just can't be involved with it Johnson.

Johnson: I know but I mean can you can you, can you, go along with me a little bit I mean 'till I get the big part of the bread?

Sears: Well . . .

Johnson: Say every pay period I could give you $50.00

Sears: Well that's not . . .

Johnson: $100.00?

Sears: It's gonna take a 100 years . . .

Johnson: huh

Sears: You didn't get it . . . You didn't get it in no $50.00 denomination man.

Johnson: No, I know I didn't borrow it like that, I didn't borrow it like that, but I am so much in a bind, so much in a bind, you know what I mean?

Sears: Can't you make some arrangements someplace else to get the money man?

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Johnson: | I tried Sears, just like uh yesterday, I was off right |
| Sears: | Yeah |
| Johnson: | I went to the loan people, they . . . I can't get no no money, not a dime. I mean I'm not sitting still you know like . . . like waiting. |
| Sears: | You realize what you are telling me, $50.00 a pay period, that's only $100 a month. |
| Johnson: | OK, say $100 every pay. |
| Sears: | That will be a 100 years. |
| Johnson: | It won't be a 100 years Sears just say $100 every pay period |
| Sears: | That's still another 10 months, for just $1000.00 |
| Johnson: | I mean just just go along with me for awhile until I, until I can get the big bread |
| Sears: | Oh . . . are you going to give me a yard a pay period? |
| Johnson: | I'll give you $100.00 every pay period, until I get . . . when I get the big money bread I'll go ahead and give it to you and get finish with you, I mean I feel bad about this myself |
| Sears: | Well don't you feel man the way that I'm jammed up and I try to help you and bail you out and try to help you. |
| Johnson: | Yeah, I understand that Sears. |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Sears: | You understand me? |
| Johnson: | But I mean you know yourself, I don't have no more annual leave, no more sick leave, I, I, left, I used it . . . |
| Sears: | I don't have nothing to do with that Johnson |
| Johnson: | I know you don't have nothing to do with it Sears. |
| Sears: | And it's not my business. |
| Johnson: | I understand that |
| Sears: | I have never . . . I have never interfered . . . when you came to me, you came to me and said Sears I need two bills, right? |
| Johnson: | Right |
| Sears: | Did I renege? |
| Johnson: | No you didn't |
| Sears: | I bought you the change there. All I told you was bring me the money the way you got it |
| Johnson: | Right |
| Sears: | Now, I have been skating because of my reputation where who I am involved with Dominick, to save your ass. |
| Johnson: | Right I understand |
| Sears: | Now I just can't stand no more pressure man I need the money. |
| Johnson: | I understand what you mean but is there any way that you can work it out with me, say for a while . . . just for a while. Every pay period I give you $100.00. |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

Sears: Yeah but do you realize I want to use that . . .

Johnson: No no just say for say for about two or three pay periods I can give you $100.00 and then by that time I be done cumulate the other part of the money.

Sears: All right, I'll go along with that but not after December, please

Johnson: No it won't be after December Sears

Sears: OK?

Johnson: Yeah

Sears: Will you do that?

Johnson: Yeah but I mean now look, no more threatening right?

Sears: No, but Johnson I just can't live like this man.

Johnson: I understand what you mean but I mean it was shocking to me man I tell you the truth I got speechless.

Sears: Well, really I meant it.

Johnson: I know you meant it, I know you meant it—

Sears: I wasn't bullshiting at all.

Johnson: I know you meant that Sears. I know you meant it.

Sears: But you know like I could pay $50.00 and that's it.

Johnson: huh

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

Sears: I could pay $50.00 and the honeymoon is over, really

Johnson: What do you mean, $50.00 for what?

Sears: Just in general to do anything to have you wasted or what.

Johnson: You mean you could pay $50.00 to have me blown away?

Sears: I could do it in a minute. All I do is pick up a phone.

Johnson: I mean do you know what that means to me Sears, I mean you know like uh . . . I hope . . . I hope you're gonna go along with this thing and not like see me Monday and come with a different, a different thing.

Sears: No, no, no I'm not going to go along and cause no problem after Monday. You are talking to me and this is what piss me off you didn't pick up the phone prior to this and be like a man and rap to me prior to this Johnson.

Johnson: Yeah, I understand

Sears: This is all I wanted you to do.

Johnson: Right

Sears: What did I tell you to do?

Sears: I paid the Dude

Johnson: What's that?

Sears: I said I paid Dominick

Johnson: I understand

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Sears: | You understand? |
| Johnson: | Yeah |
| Sears: | When you're holding me, man, this is like holding my heart to either I live or die. |
| Johnson: | I understand |
| Sears: | Give me that respect. Just pick up the phone and say hello you know well Sears . . . |
| Johnson: | I called your house, did your son tell you I called you? |
| Sears: | No, no, no, no you didn't call Sunday at all. |
| Johnson: | Well, he must didn't give you the message cause I did too call. |
| Sears: | No, I was there I was there the whole day |
| Johnson: | Yeah |
| Sears: | I went down to GPO not GPO I went to Port Authority at 6:00 in the morning and my woman came in from Philadelphia. She was just there for the weekend with the kids. |
| Johnson: | Right |
| Sears: | And I would'n't leave. She went shopping. I was waiting for you at least to call me. |
| Johnson: | Right, see I . . . |
| Sears: | I figured you was gonna renege on this shit anyway |
| Johnson: | Right |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

Sears: But I wanted you to at least give me the decency to call—

Johnson: Right

Sears: You know . . . But you turn around and you run short like that man you know, I just, I just can't carry it

Johnson: Sears, just tell me one thing man, just one thing because you know I, I mean just like I say before, I done blew my part-time job, right, you understand what I mean, I done blew it.

Sears: Well, you still have the bank.

Johnson: huh

Sears: You still have the bank.

Johnson: No, I don't have that no more I blew it man. I worried about trying, trying to get you this bread back.

Sears: Well . . .

Johnson: I been going all over, had to go to Long Island to try to get some money, I mean every door is, is closed on me, you know what I mean? Every door is closed on me.

Sears: Can you realize my position too, I have to have money to work with.

Johnson: Yeah I understand

Sears: How could I give you money if I have to take your business too

Johnson: Right

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson— GX 1-A*

| | |
|---|---|
| Sears: | You understand, to deal. |
| Johnson: | Right, I understand |
| Sears: | I have to have it to work with— |
| Johnson: | I understand |
| Sears: | And then you come up short, you understand me. |
| Johnson: | Like I say . . . |
| Sears: | I have commitments too. |
| Johnson: | Right, like I say, I owe you and each time when I borrowed money from you I paid right. |
| Sears: | This is what really blew my fucken mind man |
| Johnson: | I paid every cent . . . |
| Sears: | Otherwise I wouldn't give a shit, cause you know . . . like I say well damn you know normally you take care business. |
| Johnson: | I always take care business. Every time you lend me money I paid you back. |
| Sears: | You take care of business and it's no problem |
| Johnson: | But this time . . . like I said . . . |
| Sears: | But when you come up short like that man and the thing about it you just well disregard Sears you didn't call me I didn't know nothing at least tell me something. |
| Johnson: | Now Sears just tell me one thing before I hang up, right, tell me one thing. You're gonna, you gonna let me give you a yard every pay period. |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Sears: | All right, yes but now |
| Johnson: | But you don't . . . you don't want . . . |
| Sears: | Are you gonna be able to finish what you have to do, I go for 17 with no more interest after that, that's what you are really interested in, right? |
| Johnson: | Yeah |
| Sears: | Now, are you gonna be able to finish it before Christmas? |
| Johnson: | Before Christmas? |
| Sears: | Yes, are you, I'm asking you now— |
| Johnson: | Uh, uhuh |
| Sears: | Be a gentleman and be honest with me are you gonna be able to finish it before Christmas? |
| Johnson: | This is, what is this November, right? |
| Sears: | Right |
| Johnson: | I got, what I got one more month. The rest of this month, OK Sears. |
| Sears. | Do you think . . . |
| Johnson: | Yes |
| Sears: | Now don't, don't say OK, do you think you're gonna be able to do it? |
| Johnson: | Holdup, holdup now holdup. OK it be December or the first week in a, a January |
| Sears: | All right |
| Johnson: | Not past that. |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Sears: | Now can I assume I think the 21st is pay day, right? |
| Johnson: | Yeah |
| Sears: | So that's a yard, right? |
| Johnson: | Yeah |
| Sears: | After that, you're going to give me a yard every payday |
| Johnson: | Right |
| Sears: | And you will finish me before, you can't do it before the . . . |
| Johnson: | I'm, I'm going to try to do it before before December go out. |
| Sears: | OK and what is your latest date in January? |
| Johnson: | The first week. |
| Sears: | The first week? |
| Johnson: | Right, that's a pay period ain't it? |
| Sears: | I don't know, I . . . |
| Johnson: | Yeah, first week, first in every month is a pay period |
| Sears: | Hold on let me take a look at the calendar, yeah? |
| Johnson: | OK, that's fine Sears? |
| Sears: | All right |
| Johnson: | Sears . . . |
| Sears: | Now, just don't run no games. |
| Johnson: | No I'm not gonna run no games. |

*Transcript of Telephone Conversation of November 7, 1975 between Clarence Sears and James Johnson—GX 1-A*

| | |
|---|---|
| Sears: | Give me respect to give me a phone call let me know man |
| Johnson: | But now that's final now? |
| Sears: | All right that's final. |
| Johnson: | You're not gonna threaten me no more? |
| Sears: | I'm not gonna involve you no more, just take your business and are you gonna be able to do what you're doing like you say, right? |
| Johnson: | Yes |
| Sears: | With no sweat? |
| Johnson: | No sweat |
| Sears: | And the first month in January is it? |
| Johnson: | I'll be finished with you. |
| Sears: | OK |
| Johnson: | OK Sears? |
| Sears: | All right |
| Johnson: | Thanks a lot |
| Sears: | Bye |
| Johnson: | Bye now. |

AFFIDAVIT OF MAILING

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

ROBERT J. JOSSEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of July, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

SHEILA GINSBERG ESQ.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

ROBERT J. JOSSEN

Sworn to before me this
12th day of July 1976

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977